UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR et al.

Plaintiffs,

- against –

FAIRFIELD GREENWICH LIMITED et al.

Defendants.

Consolidated Case
Docket No. 09 CV 00118 (VM)

MEMORANDUM OF LAW OF THE KNIGHT SERVICES HOLDINGS LIMITED AND THE AMERICAS/SWISSCO. TRUSTS IN FURTHER SUPPORT OF THEIR MOTION FOR APPOINTMENT AS LEAD PLAINTIFFS OVER THE FEDERAL SECURITIES CLAIMS, THE SELECTION OF LEAD COUNSEL, AND IN OPPOSITION TO THE COMPETING APPLICATIONS

Daniel W. Krasner
Gregory Mark Nespole
Gustavo Bruckner
Russell S. Miness
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
(212) 545-4600

Attorneys for Movants

Dockets.Justia.com

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PRELIMINARY STATEMENT

The Knight Services Holdings Limited and the Americas/SwissCo. Trusts ("Movants") submit this memorandum of law in support of their motion for appointment as lead plaintiffs in the above-captioned actions over the federal securities claims, approval of lead plaintiffs' selection of lead counsel, and in opposition to the competing motions for the appointment of lead plaintiff filed by (i) the Anwar Plaintiffs and (ii) the Fairfield Investor Group.

Movants, the Anwar Plaintiffs, and the Fairfield Investor Group each moved the Court on May 11, 2009 to be appointed lead plaintiffs pursuant to the procedures set forth in section 21D of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Upon review of the competing motions, it is clear that Movants have the largest financial interest of any investor that does not otherwise suffer from an infirmity under Rule 23 of the Federal Rules of Civil Procedure that renders it inadequate or atypical. Accordingly, Movants should be appointed lead plaintiffs over the federal claims.

ARGUMENT

A. Controlling Authority and the PSLRA's Rebuttable Presumption

The PSLRA states that the court should appoint as lead plaintiff "the member or members of the purported class that the court determines to be most capable of adequately representing the interests of class members…." 15 U.S.C. § 78u-4(a)(3)(B)(i). There is a presumption that the "most adequate" lead plaintiff is the movant with the largest financial interest in the relief sought by the class and that otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii); *see, e.g.*, *Lipetz v. Wachovia Corp.*, No. 08 Civ 6171, 2008 WL 4615895, at **2-3 (S.D.N.Y. Oct. 10, 2008) (citing *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 436-37 (S.D.N.Y. 2008)).

The examination does not end, however, once the court identifies the applicant with the largest notational interest. "The process [then] turns adversarial and other plaintiffs may present evidence that disputes the lead plaintiff's prima facie showing of typicality and adequacy." *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002):

> The District Court must focus its attention on that plaintiff and determine, based on the information he has provided in his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular those of "typicality" and "adequacy." If the plaintiff with the largest financial stake in the controversy provides information that satisfies these requirements, he becomes the presumptively most adequate plaintiff**. If the plaintiff with the greatest financial stake does not satisfy the Rule 23(a) criteria, the court must repeat the inquiry, this time considering the plaintiff with the next-largest financial stake, until it finds a plaintiff who is both willing to serve and satisfies the requirements of Rule 23**.

In re Host Am. Corp. Sec. Litig., 236 F.R.D. 102, 105 (D. Conn. 2006), at *8 (*quoting In re Cavanaugh*, 306 F.3d at 730)(emphasis added).

As demonstrated below, Movants have made the requisite showing to rebut any presumption that the Anwar Plaintiffs are the most adequate lead plaintiffs.

B. The Anwar Plaintiffs are Atypical Because They are Subject to Unique Defenses

The circumstances require that the Court look beyond the amount of the Anwar Plaintiffs' reported losses and strip them of the title of presumptive lead plaintiff. The Rule 23(a)(3) typicality requirement incorporated into the PSLRA is designed "to ensure that 'maintenance of a class action is economical and that the named plaintiff's claims and the class' claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 122 (S.D.N.Y. 2001) (quoting *General Tel. Co. Falcon*, 457 U.S. 147, 157 n.13 (1982)). Accordingly, a proposed lead plaintiff is inadequate if it is subject to unique defenses or other issues that render its interests at odds with those of the class. *See In re Olsten Corp. Sec. Litig.*, 3 F.Supp. 2d 286, 295-96 (E.D.N.Y. 1998) (typicality is shown by demonstrating that each class member's claim arises from the same course of conduct and each class member makes similar legal arguments to prove defendants' liability.).

The Anwar Plaintiffs are inadequate lead plaintiffs because their representatives and counsel, on numerous occasions, have stated on the record they are not interested in advancing the federal securities claims (including claims against auditor defendants) on behalf of the Class. Indeed, the Anwar Plaintiffs' voluminous Consolidated Amended Complaint alleges seventeen counts arising under state law, yet purposely omitted Exchange Act claims. The Anwar Plaintiffs, only after having been threatened with a challenge to their leadership, have changed course and stated that they will consider prosecuting the federal claims.

This omission was material because the federal securities laws offer the Class viable "control person" causes of action under the Exchange Act. The federal securities laws also provide the Class with a powerful body of law through which to pursue claims against auditors and administrators.

Moreover, the appointment of the Anwar Plaintiffs, regardless of whether they promise to allege federal claims in a future amended pleading, will prejudice those Class members asserting federal claims. The Anwar Plaintiffs have little to no motivation to address complicated issues arising under the PSLRA's pleading standards. This, standing alone, renders them antagonistic to the members of the Class and inadequate to be a lead plaintiff over the federal securities claims. *See In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2007 WL 656880, at *3 n.43 (S.D.N.Y. Feb. 28, 2007) (Scheindlin, J.) ("An antagonistic interest arises when there is a fundamental conflict or inconsistency between the claims of the proposed class members that is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation.") (internal quotations omitted). Accordingly, the conscious decision to omit federal claims and the tensions associated with alleging them as mere afterthoughts renders the Anwar Plaintiffs both inadequate and atypical with respect to prosecuting these claims.

C. Movants are Presumptively the Most Adequate Lead Plaintiff

As demonstrated above, Movants have rebutted any presumption that the Anwar Plaintiffs should be appointed lead plaintiff. Thus, given that Movants suffered losses totaling $1,499,991 and the Fairfield Investor Group (the only remaining movant) suffered losses of only $916,890, Movants are presumptively the most adequate lead plaintiff. *See In re Cavanaugh*, 306 F.3d at 729-30. Further, this presumption is unassailable because Movants have made the necessary showing at this stage to demonstrate that they are both adequate and typical. *In re Cendant Corp. Litig*., 264 F.3d 201 (3d Cir. 2001)(movant need only make a prima facie showing of adequacy and typicality).[1]

Therefore, Movants are the putative lead plaintiff candidate with the largest financial interest and that otherwise satisfies Rule 23. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc).

D. Movants are Committed to the Efficient Prosecution of This Action

Movants, as the presumptive lead plaintiff with respect to the federal claims, are mindful that this litigation requires a strategy that avoids redundancy. In this regard, Movants submit that Judge Griesa recently addressed a similar set of circumstances in the Madoff related feeder fund litigation entitled *In Re Tremont Securities Law, State Law and Insurance Litigation,* C.A. No. 1:08-cv-11117 (TPG).

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[1] This is not the first time that members of Fairfield Investor Group and its counsel (Cohen Milstein Sellers & Toll PLLC) have tried to secure a lead counsel role in this case. Members of the Fairfield Investor Group previously filed a complaint that did not allege federal securities claims. Instead, they alleged a single claim under the Investment Advisors Act, 15 U.S.C. § 80b-1 *et seq.* Cohen Milstein requested by letter to be appointed an additional interim class counsel; the Court denied the application on March 13, 2009.

In *In Re Tremont*, Judge Griesa ordered that related federal securities, state law, and insurance claims against Tremont Group Holdings, Inc. (a major feeder fund to Madoff) and other related entities should be consolidated under one master docket and then organized into three sub-groups so as to avoid any possible conflict. Each of the groups was assigned separate lead counsel to pursue the respective claims and Wolf Haldenstein Adler Freeman & Herz LLP was appointed as one of the lead counsel. A copy of the transcript of the hearing and Judge Griesa's Order are annexed, as Exhibits 1 and 2, to the Declaration of Gregory M. Nespole, dated May 29, 2009 offered in support of Movants' application.

Movants propose that a similar procedure and structure could be adopted here. The Anwar Plaintiffs' counsel would remain lead plaintiffs with respect to the prosecution of the state law claims alleged in the Consolidated Amended Complaint. Movants could then be appointed lead plaintiff with respect to the federal securities claims. Though the action would remain consolidated, separate lead plaintiffs would prosecute the different claims, through separate lead counsel (working together in an organized manner), thereby eliminating the specter of any conflict or other antagonism while still promoting judicial efficiency.

CONCLUSION

For the foregoing reasons, Movants respectfully request that Court appoint them lead plaintiffs and their chosen counsel, Wolf Haldenstein Adler Freeman & Herz LLP, be appointed lead counsel over the federal securities claims.

Respectfully submitted,

Dated: May 29, 2009

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

By: /s/_________________

Daniel W. Krasner
Gregory M. Nespole
Gustavo Bruckner
Russell S. Miness
270 Madison Ave.
New York, NY 10016
(212) 545-4600

Attorneys for Movants

/546100